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October Term, 1960

SUPREME COURT, U. S.

No. 138

IDLEWILD BON VOYAGE LIQUOR CORPORATION,
Petitioner,

against

THOMAS E. ROHAN, MARTIN C. EPSTEIN, WILLIAM H. MORGAN, GRANT F. DANIELS and SAMUEL M. BIRNBAUM, being the Chairman, Members and Commissioners of the State Liquor Authority of the State of New York,
Respondents.

PETITION FOR A WRIT OF CERTIORARI FOR THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

No. 1220 MISC.

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Petitioner,

against

HONORABLE ALEXANDER BICKS, HONORABLE EDWARD J. DIMOCK, HONORABLE JOHN M. CASHIN, JUDGES OF THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK,
Respondents.

MOTION FOR LEAVE TO FILE A PETITION FOR A WRIT OF MANDAMUS

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MOTION FOR LEAVE TO FILE A PETITION FOR A WRIT OF MANDAMUS

The Applications

Petitioner, Idlewild Bon Voyage Liquor Corporation, (hereafter called "Idlewild"), seeks a writ of certiorari to review the decision of a divided United States Court

of Appeals for the Second Circuit, rendered April 14, 1961, which dismissed its appeals from decisions by Judge Bicks and Judge Dimock; and to review so much of the Injunction Order of the Circuit Court of Appeals, dated May 15, 1961, as denied Idlewild's motion to recall and clarify the judgment of that Court so as to conform to its decision.

Furthermore, Idlewild hereby moves for leave to file a petition for a writ of mandamus directed to Honorable Alexander Bicks, Honorable Edward J. Dimock and Honorable John M. Cashin, Judges of the United States District Court for the Southern District of New York, requiring them to convene a district court of three judges and to grant Idlewild further appropriate relief.

These petitions for a writ of certiorari, and/or for a writ of mandamus, are presented together because they arise out of identical facts, but differing judicial views, on the important question of federal jurisdiction and procedure common to both petitions, namely: what is the appropriate forum to determine the admittedly "substantial" Federal constitutional and statutory rights of Idlewild, "a party who we believe is entitled to relief" (110a)* according to the Court of Appeals, in the face of immediate irreparable injury threatened by the New York State Liquor Authority.

Idlewild's complaint invoked its constitutional rights, its statutory rights, and such other relief as may be just and proper.

Reference to Opinions Below

Judge Bicks' initial decision of November 4, 1960 (49a) is reported at 188 F. Supp. 434.

Judge Dimock's subsequent opinion (88a) and order (93a) have not been officially reported.

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* All such references are to the pages of Petitioner's Appendix.

The majority and dissenting opinions of the Court of Appeals (103a, 111a) dismissing Idlewild's appeals from the decisions of Judge Bicks and Judge Dimock have not yet been officially reported. The judgment of the Court of Appeals is reprinted at 116a.

Judge Cashin's subsequent decision and order (130a) have not been officially reported.

The Injunction Order of the Court of Appeals, denying, *inter alia*, Idlewild's application for clarification of its judgment, is reprinted at 147a.

Jurisdictional Statement

The judgment of the Court of Appeals was entered on April 28, 1961, and the Injunction Order of the Court of Appeals, denying Idlewild's alternative application to recall and clarify its judgment, was entered on May 15, 1961.

The decisions of Judges Bicks, Dimock and Cashin,—all denying Idlewild's successive applications to convene a district court of three judges and for injunctive relief, were rendered on November 4, 1960, December 28, 1960 and May 3, 1961, respectively.

The jurisdiction of this Court is invoked on certiorari under 28 U. S. C. §1254(1) because the decision of a divided Circuit Court of Appeals presents important questions of federal constitutional and statutory law and jurisdiction, and, in our view, is in conflict with applicable decisions of this Court and other U. S. Courts of Appeal—questions which should now be definitively settled by this Court (Rule 19).

The jurisdiction of this Court to issue a writ of mandamus is invoked under 28 U. S. C. §1651(a). The application for mandamus is made pursuant to the holding of the majority of the Court of Appeals, on authority of *Stratton* v. *St. Louis S.W. Rwy. Co.*, 282 U. S. 10, that Idlewild's "proper remedy was a writ of mandamus from the Su-

preme Court" (106a) to review the refusals of Judge Bicks and Judge Dimock to convene a three-judge district court for a determination of the "substantial federal question" here presented by "a party who we believe is entitled to relief" (104a, 107a, 108a, 110a), and the subsequent holding by Judge Cashin that those refusals are "the law of the case" and Idlewild's remedy "is a writ of mandamus" (135a).

The Questions Presented

(1) Should a district court of three judges be convened, pursuant to 28 U. S. C. §§2281 and 2284, where the undenied allegations of Idlewild's complaint pose a "substantial federal question" as to the legality of attempted State regulation of exports contrary both to (a) the Foreign Commerce Clause, (b) the Export-Import Clause, and (c) the Supremacy Clause of the Constitution of the United States, and to the preemptive provisions of the Tariff Act of 1930, 19 U. S. C. §1311, together with the regulations thereunder (19 C. F. R. Parts 18 and 19) and associated provisions of the Federal Internal Revenue Code (26 U. S. C. §§5521 and 5522)?

(2) Does the Circuit Court of Appeals have jurisdiction over final and otherwise appealable orders under 28 U. S. C. §§1291 and 1292(a)(1) where, as here, single district judges, having original jurisdiction under 28 U. S. C. §§1337 and 1331, have denied Idlewild's applications for convening a three-judge district court, for enforcement of its statutory rights, and for injunctive relief against attempted regulation by the New York Liquor Authority of exports contrary to the uniform construction by the New York courts of the New York Alcoholic Beverage Control Law (*Ex Parte Bransford*, 310 U. S. 354, 361)?

(3) Should the Federal District Court abdicate its jurisdiction and deny Idlewild its statutory right (28 U. S. C. §§2281, 2284, 1331 and 1337) of access to the Federal District Court to vindicate its substantial Federal rights under the Federal Constitution, statutes and administrative regulations, despite imminent irreparable injury, where, as here,

(a) Idlewild is engaged solely in the business of exports pursuant to an exclusive and preemptive Federal program adopted by Congress pursuant to the Foreign Commerce, Export-Import and Supremacy Clauses of the Constitution of the United States;

(b) The Federal Tariff Act of 1930, 19 U. S. C. §1311, together with the Regulations thereunder (19 C. F. R. Parts 18 and 19) and the associated provisions of the Internal Revenue Code (26 U. S. C. §§5521 and 5522), constitute a comprehensive, exclusive and preemptive Federal program for the promotion of exports of liquor in foreign commerce, and hence Idlewild is entitled to the relief it seeks even if, contrary to the uniform New York decisions, the Alcoholic Beverage Control Law should be held applicable here (*Penagaricano* v. *Allen Corporation*, 1 Cir., 267 F. 2d 550, 557-558; *All American Airways* v. *Village of Cedarhurst*, 2 Cir., 201 F. 2d 273, 277);

(c) The New York Courts have uniformly held that the New York Alcoholic Beverage Control Law is inapplicable or "inoperative" if applied to sales of liquor for export in foreign commerce under constant United States Customs Bond, regulation and supervision,—the very transactions here involved. (*Matter of Gulf Oil Corp.* v. *McGoldrick*, 256 App. Div. 207, 209, 210 (1st Dept., 1939), aff'd 281 N. Y. 647, aff'd *McGoldrick* v. *Gulf Oil Corp.*, 309 U. S. 414; *During* v. *Valente*, 267 App. Div. 383, 386 (1st Dept., 1944); *Rosenblum* v. *Frankel*, 279 App. Div. 66, 68 (1st Dept., 1951);

(d) The State Court remedies provided by the New York Alcoholic Beverage Control Law, §121, have already been judicially considered and held "inadequate" (*Burack* v. *State Liquor Authority of the State of New York*, 160 F. Supp. 161, 165 (E. D. N. Y., 1958)?

(4) Where the Court of Appeals has dismissed appeals from orders otherwise appealable, on the ground that such orders were made without jurisdiction because only a district court of three judges could determine the "substantial federal question" presented, should the Court of Appeals vacate the orders under appeal and remand the case to the District Court for proceedings not inconsistent with its decision (28 U. S. C. §2106; *Two Guys From Harrison-Allentown, Inc.* v. *McGinley*, 3 Cir., 266 F. 2d 427, 433; *Chicago, Duluth & Georgian Bay Transit Co.* v. *Nims*, 6 Cir., 252 F. 2d 317, 319; *Board of Supervisors* v. *Tureaud*, 5 Cir., 207 F. 2d 807, 810, vacated and remanded on other grounds, 347 U. S. 971.)?

(5) Are the judges of the Federal District Courts so bound by the doctrine of "the law of the case" that they are required to follow a prior decision of another district judge of the same Court without regard either to a radical change in the circumstances presented to the first judge or a subsequent holding by the Circuit Court of Appeals that the decision of the first district judge was erroneous and without jurisdiction?

Constitutional and Statutory Provisions Involved

(1) Federal Constitutional Provisions

(a) "The Congress shall have Power * * * To regulate Commerce with foreign Nations" (Art. I, §8).

(b) "No State shall, without the Consent of the Congress, lay any Imposts or Duties on Imports or Exports" (Art. I, §10).

(c) "This Constitution, and the laws of the United States which shall be made in Pursuance thereof * * * shall be the Supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding" (Art. VI).

(2) Federal Statutes and Regulations

The Appendix sets forth the pertinent provisions of the Federal Statutes providing for (a) a district court of three judges in constitutional cases 28 U. S. C. §§2281 and 2284 (1) and (3) (148a); (b) original jurisdiction of the federal district courts in federal question cases and cases arising under any Act of Congress regulating commerce, 28 U. S. C. §§1331 and 1337 (149a); (c) appellate jurisdiction of the Circuit Court of Appeals over final orders and interlocutory orders of the district courts refusing injunctions, 28 U. S. C. §§1291 and 1292(a)(1) (149a); (d) the powers of the federal appellate courts, 28 U. S. C. §2106 (150a); and (e) the pertinent substantive provisions of the Federal Tariff Act of 1930, 19 U. S. C. §1311 (17a), together with the applicable regulations thereunder, 19 C. F. R. Parts 18 and 19 (154a), and associated provisions of the Internal Revenue Code, 26 U. S. C. §§5521, 5522, and 5523 (150a).

(3) New York State Statutory Provisions

The pertinent provisions of the New York Alcoholic Beverage Control Law are reprinted in the Appendix (30a-33a).

Statement of the Case

(1) The Importance of this Case

These petitions for certiorari and/or mandamus are Idlewild's last resort in its long quest for a remedy for its admittedly "substantial" Federal rights under the Constitution and laws of the United States invoked in its complaint.

Here are many questions of importance to the due administration of justice throughout the federal system, as evidenced by the bewilderingly different views expressed in the five judicial opinions presented for review.

Such questions include (a) Idlewild's statutory right of access to the federal district courts to protect its substantial constitutional and statutory federal rights against State interference where the federal rights are preemptive and exclusive, the State courts themselves have so held, and the State judicial remedies are inadequate; (b) the proper tribunal to determine such federal rights in the first instance; (c) the appellate jurisdiction of the Circuit Courts of Appeals and of this Court in such cases; and (d) the proper application of the "law of the case" by the federal district courts.

The decisions below have left the proverbial "little fellow" helplessly caught in the gears of the cumbersome machinery of justice amid a welter of contradictory decisions possessing but one common denominator,—a refusal to afford a remedy for Idlewild's substantial Federal rights in a situation where the Court of Appeals has de-

scribed the plaintiff Idlewild as "a party who we believe is entitled to relief."

This case, we submit, cries out for review by this Court to the end that others may not become inextricably enmeshed in a similar procedural web, after four decisions and five different opinions, and with a hearing on the merits not yet in sight a year after this urgent case was commenced and large expense has been necessitated.

(2) The Nature of the Case

This action is for declaratory and injunctive relief and for an adjudication that the Constitution and laws of the United States preclude the application of the New York State Alcoholic Beverage Control Law to Idlewild's export business and the destruction thereof by the New York Liquor Authority.

As Judge Dimock noted (98a):

> "Plaintiff certainly raises a serious legal issue when it states that what New York is regarding as unlawful has been ruled by the United States to be lawful foreign commerce."

The Court of Appeals thrice held that "a substantial federal question" is thus presented (104a, 107a, 108a).

(3) Idlewild's Lawful Export Business

Idlewild, a New York corporation, is engaged in selling United States Customs bonded, tax-free wines and liquors, solely for export, to overseas passengers from premises leased from the New York Port Authority, a bi-State agency, at Idlewild Airport (49a-50a, 90a, 130a-131a).

Each bottle of liquor sold by Idlewild remains under continuous United States Customs bond, regulation and supervision from the time it is withdrawn from Class 6

United States Government bonded manufacturing warehouses, and the United States Customs bonded storage warehouses; during the time it is rewarehoused at Idlewild's premises under United States Customs control, until the bottle is placed aboard the aircraft for delivery to the passenger only upon and after arrival at his foreign destination (3a-5a, 36a). Idlewild is required to account, on United States Customs forms, for each and every bottle (3a, 36a).

The privilege accorded the outgoing passenger to export liquor free of tax and duty here or abroad is reciprocal to the privilege accorded incoming passengers to purchase a limited quantity of liquor in foreign countries for import into the United States free of tax or duty here or abroad (5a-6a, 37a).

The obvious purposes of the right of thus exporting a bottle of liquor tax-free are (1) to encourage foreign commerce, and (2) to promote domestic exports,—a particularly pressing national interest in view of the present crisis in our balance of payments.

The United States Treasury Department, Bureau of Customs, supervises the conduct of Idlewild's business. It has approved Idlewild's premises, and has prescribed Idlewild's procedures. Finally, the United States Treasury Department, Bureau of Customs has expressly ruled that Idlewild's business constitutes the exportation of merchandise within the meaning of §311 of the Tariff Act of 1930, 19 U. S. C. §1311 (50a, 131a, 15a-20a).

The New York State Tax Commission has also ruled that a business such as Idlewild's, which consists of sales of liquor in United State Customs bond withdrawn from Class 6 warehouses under federal regulation, is not a "sale" subject to the New York State Alcoholic Beverage tax. Tax Law §§420(10), 424, 429 (26a-27a).

(4) The State Liquor Authority's Assertion that Idlewild's Business is "Illegal" under New York Law

Out of an abundance of caution, Idlewild inquired of the State Liquor Authority whether its business was subject to the New York State Alcoholic Beverage Control Law. The State Liquor Authority sought and obtained an opinion from the New York State Attorney-General (1960, Op. Atty. Gen., June 30) to the effect that (1) Idlewild's business constituted a "sale" within the meaning of the Alcoholic Beverage Control Law, §3(28), but (2) there is no provision of that Law which would authorize a license for such sales for export, and (3) no person can sell alcoholic beverages within New York without a license (51a, 90a, 131a, 21a-24a).

Thereupon the State Liquor Authority determined, and so advised Idlewild's counsel (25a), that its business

> "* * * is in conflict with the laws of the State of New York and, therefore, would be illegal."

(5) The Institution of this Action to Protect Idlewild's Federal Rights

The immediate practical effect of this "determination" was to place Idlewild in dire jeopardy. As Judge Bicks found (51a, 188 F. Supp. at p. 436):

> "The New York Importers & Distillers Association circularized its members advising that in view of the position of the Attorney General and of §62 of the Alcoholic Beverage Control Law, they could not legally fill plaintiff's orders. Plaintiff has not since been able to make purchases to meet its requirements and faces the prospect of closing its doors, with consequent substantial damage."

This action was accordingly instituted on July 22, 1960, for the protection of Idlewild's constitutional and statutory rights; and a motion for the impanelling of a three-judge court pursuant to 28 U. S. C. §§2281 and 2284 (32a) and an application, by order to show cause, for a temporary injunction (33a-34a) were filed and served simultaneously with the complaint.

(6) The Representations of the State Liquor Authority Before Judge Bicks that Idlewild's Business was not Threatened

Confronted with the square conflict between their claim of illegality under State Law and Idlewild's federal rights, the State Liquor Authority sought to delay an adjudication. It appeared before Judge Bicks by the Attorney-General of the State of New York and cross-moved to dismiss the complaint on the ground that the state courts afforded an "efficient remedy" and that (42a, 75a):

> "The complaint makes no claim that the State Liquor Authority is threatening, directly or indirectly, to take steps to interfere with plaintiff's operations. Since the plaintiff is a non-licensee, there is no real action the State Liquor Authority can take against the plaintiff."

(7) Judge Bicks' Decision Remitting Idlewild to the State Courts

Because of what he deemed to be the "tentative and hypothetical posture" of the case before him (53a), Judge Bicks decided (55a, 188 F. Supp. 437-8):

> "Although the substantive issues raised in the complaint may not be considered by the judge to whom application under 28 U. S. C. A. §2281 is made, he has

the power to retain jurisdiction pending state court adjudication where, as here, there is insufficient basis to support intervention by a federal court of equity. (Citing cases)

"Motion for impanelling of a three-judge court denied, with leave to renew after the state court has ruled."

Judge Bicks' decision disregarded Idlewild's statutory right to the exercise by him of original jurisdiction under 28 U. S. C. §§1337 and 1331.

(8) Idlewild's Appeal and the Immediate Extra-legal Retaliation by the State Liquor Authority

Idlewild promptly appealed Judge Bicks' decision (56a).

Five days later, the State Liquor Authority issued a subpoena *duces tecum* directed to Idlewild. Notwithstanding its representations before Judge Bicks that "since the plaintiff is a non-licensee, there is no real action the State Liquor Authority can take against the plaintiff" (64a, 67a, 75a), the subpoena expressly required Idlewild to appear and testify concerning its business "*under the license to sell alcoholic beverages issued by the State Liquor Authority*" (69a).*

Thus, the State Liquor Authority, acting under color of State law, reversed its field and went back on its representation to Judge Bicks that "there is no real action" or "steps to interfere" which it could take against Idlewild. Instead, it sought to cut in ahead of the Court of Appeals and to hale Idlewild before itself for an inquisition as prosecutor, judge and jury to pass upon its own assault upon Idlewild's Federal rights.

No more overt interference could there be than the bald threats thereafter made on three occasions by officials of the State Liquor Authority to the several United States

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* Emphasis has been supplied throughout this petition.

Customs bonded interstate truckers who had been making deliveries to Idlewild (76a, 78a-81a). This was a palpable attempt, *vi et armis*, to frustrate Idlewild's resort to the federal courts by choking off its last lifeline of supply from out-of-state sources to which Idlewild had been driven because the State Liquor Authority's prior determination of illegality had frightened off its New York suppliers (51a, 131a).

(9) Judge Dimock's Decision

Accordingly, Idlewild again moved for a temporary injunction *pendente lite* and for the impanelling of a three-judge court (71a-72a). This motion, together with Idlewild's application to quash the subpoena *duces tecum*, came on before Judge Dimock, who held that he had to follow Judge Bicks (89a), but that (91a):

> "Plaintiff is entitled to an injunction against harassment by defendant pending the appeal from the order of Judge Bicks."

(10) The Court of Appeals' Decision

A majority of the Court of Appeals, Chief Judge Lumbard dissenting, held that since "a substantial federal question existed" (104a, 107a, 108a), "a three-judge district court should have been convened" by Judge Bicks and Judge Dimock to decide, *inter alia*, whether to apply the so-called doctrine of "abstention" (109a, 110a). Accordingly, although the orders of both judges were held to be otherwise appealable (105a-106a, 109a, 111a), the majority held that *since* Judge Bicks and Judge Dimock "had no jurisdiction to proceed * * * we must conclude from *Stratton* that we have no jurisdiction to entertain an appeal" from either decision (108a, 110a).

The majority conceded "this result leaves us in a somewhat anomalous position" (108a), and concluded (110a):

> "The results we reach are unhappy ones. We are refusing access to our court to a party who we believe is entitled to relief."

Idlewild's statutory right to the exercise of original jurisdiction by the District Court with a single judge under 28 U. S. C. §§1337 and 1331 was at least impliedly overruled.

In his dissenting opinion Chief Judge Lumbard took issue, saying (114a-115a):

> "The majority's view, however, imposes on the federal courts a procedure of piecemeal review whereby a court of appeals is always forced to stay its hand whenever an appellant or appellee argues to it that the decision below should have been made by a three-judge court. No matter how worthless such a claim may be, we would not be able to dispose of it on an appeal from a final order but would have to await a decision on a petition for mandamus in the Supreme Court. Only after the Supreme Court decided the jurisdictional question might we be permitted to consider the merits, and the merits would not be ripe for Supreme Court review until we had passed upon them on remand. I cannot believe that the authority of the Supreme Court over three-judge tribunals was intended to extend so far as to preclude us from deciding the jurisdictional issue when a district judge enters an order that is otherwise appealable under 28 U. S. C. §§1291, 1292, and thereby to impose on the parties a procedure calling for separate appellate consideration of the jurisdictional and substantive questions."

Thus, the sure result of the majority decision of the Court of Appeals will be to flood this Court with petitions for mandamus whenever, in a case where Federal constitutional rights are involved the district court applies the so-called doctrine of abstention or claim has been unsuccessfully made for decision by a three-judge court.

(11) Judge Cashin's Decision

Idlewild promptly sought to comply with the decision of the Court of Appeals and moved again in the District Court to convene a three-judge district court and for injunctive relief, in accordance with the procedure suggested by this Court in *Stratton* v. *St. Louis S. W. Ry. Co.*, 282 U. S. 10, 18, and by Mr. Justice Stewart in *Chicago, Duluth & Georgian Bay Transit Co.* v. *Nims*, 6 Cir., 252 F. 2d 317, 319.

Judge Cashin denied these applications. He characterized as "dictum" the holding by the Court of Appeals that "a three-judge district court should have been convened" (132a); and, overlooking the very *ratio decidendi* of that Court, he followed as "the law of this case" and "as still in full force and effect" (133a) the very refusals by Judge Bicks and Judge Dimock to convene a three-judge district court which the Court of Appeals had just held to be erroneous, without jurisdiction and hence nullities. *Valley* v. *Northern Fire Ins. Co.*, 254 U. S. 348, 353-4; *McQuillen* v. *Dillon*, 2 Cir., 98 F. 2d 726, 729, cert. den. 305 U. S. 655; *Pollitz* v. *Wabash R. Co.*, 180 F. 950, 951 (C. C. S. D. N. Y.).

(12) The Court of Appeals' Refusal to Recall and Clarify Its Judgment

In a final effort to avoid burdening this Court, counsel and the litigants with the expenditure of time, money and effort entailed by these conflicting judicial expressions, Idlewild moved in the Court of Appeals for an order clarifying its judgment of dismissal (as authorized by *National Comics Publications* v. *Fawcett Publications*, 2 Cir., 198 F. 2d 927 and *Epstein* v. *Goldstein*, 2 Cir., 110 F. 2d 747, 748) so as to test Judge Cashin's characterization as "dictum," and to remand this case to the District Court for "such further proceedings * * as may be just under the cir-

cumstances," as authorized by 28 U. S. C. §2106 and as was done under similar circumstances in *Two Guys From Harrison-Allentown, Inc.* v. *McGinley*, 3 Cir., 266 F. 2d 427, 433, and *Board of Supervisors* v. *Turcaud*, 5 Cir., 207 F. 2d 807, 810, vacated and remanded on other grounds in 347 U. S. 971.

The Court of Appeals' denial was without opinion (147a).

ARGUMENT

POINT I

Idlewild's petition for certiorari to review the admittedly "anomalous" majority decision of the Circuit Court of Appeals presents important questions of federal constitutional and statutory law and of judicial jurisdiction which should be settled by this Court.

(1) The majority in the Court of Appeals held that since "a substantial federal question exists" (104a, 107a) in this case,

> "* * * we are of the opinion that the determination of whether a federal court ought to abstain is a determination that may only be made in the first instance by a three-judge district court" (108a).

(2) All three judges in the Court of Appeals agreed that "the orders made by Judges Bicks and Dimock are of the sort which are ordinarily appealable" to that Court under 28 U. S. C. §§1291 and 1292(a)(1) (105a-106a, 109a, 111a).

The majority, however, reached the frankly "*anomalous position*" (108a) of distinguishing the recent decision of the Second Circuit in *Bell* v. *Waterfront Commission of*

New York Harbor, 2 Cir., 279 F. 2d 853 (107a, 109a), and of dismissing Idlewild's appeals, on the very grounds that Idlewild was right in its contentions that "a substantial federal question existed" on constitutional grounds and that "a three-judge district court should have been convened" by Judge Bicks and Judge Dimock (109a).

(3) Also, Idlewild's complaint challenges, in addition, the regulatory power of the State Liquor Authority on Federal *statutory* grounds (irrespective of constitutional issues) of which a *single* federal district judge clearly has original federal jurisdiction under 28 U. S. C. §§1331, 1337. (*Ex Parte Bransford*, 310 U. S. 354, 361.)

Thus, Idlewild contends that Section 311 of the Federal Tariff Act of 1930, 19 U. S. C. §1311, and the detailed federal regulation and supervision of the exports here involved are preemptive, and "the scheme of federal regulation [is] so pervasive as to make reasonable the inference that Congress left no room for the States to supplement it". *Pennsylvania* v. *Nelson*, 350 U. S. 497, 502; *Rice* v. *Santa Fe Elevator Corp.*, 331 U. S. 218, 230.

The effect of the decision of the Court of Appeals was also to nullify this statutory right to original jurisdiction.

(4) Idlewild further contends, *inter alia*, that the State Liquor Authority is attempting here to misapply the New York Alcoholic Beverage Law to exports in foreign commerce, contrary to the uniform rulings of the New York courts themselves and contrary to Idlewild's Federal statutory rights.

"In such a case the attack is aimed at an allegedly erroneous administrative action" which "does not require a three-judge court" even though based on "the unconstitutionality of the result obtained". (*Ex Parte Bransford*, 310 U. S. 354, 361.)

(5) Here the majority in the Court of Appeals held that the mere presence of substantial Federal Constitutional questions as to state action (a) deprived a single district judge, otherwise vested with original federal jurisdiction on non-constitutional grounds under 28 U. S. C. §§1331 and 1337, of all jurisdiction to decide the issues, and (b) deprived the Court of Appeals of jurisdiction to review such decisions, although they are "ordinarily appealable" (105a-106a, 109a, 111a) under 28 U. S. C. §§1291, 1292(a)(1).

POINT II

This petition for certiorari also presents for review the failure and refusal by the Court of Appeals to vacate the orders below which it itself held were rendered without jurisdiction,—a refusal in conflict with decisions of the Courts of Appeals for the Third, Fifth and Sixth Circuits and in conflict with the implications of decisions by the Supreme Court.

(1) *Stratton* v. *St. Louis S.W. Rwy. Co.*, 282 U. S. 10, was the decision principally invoked by the majority of the Court of Appeals for its holding that Idlewild's "proper remedy was a writ of mandamus from the Supreme Court." But in the *Stratton* case, this Court held (282 U. S. at p. 18) that although a writ of mandamus was still available:

> "It is not necessary, however, that formal application should be made for such a writ, as the District Court may now proceed to take the action which the writ, if issued, would require."

In keeping with this recommendation by this Court, Idlewild thereupon attempted to comply with the majority decision of the Court of Appeals by renewing its appli-

cation to the District Court for the impanelling of a three-judge court and for injunctive relief (117a). This was the procedure proposed by Judge (now Mr. Justice) Stewart in *Chicago, Duluth & Georgian Bay Transit Co.* v. *Nims*, 6 Cir., 252 F. 2d 317, 319:

> "Were we to agree with the appellant's position that a court of three judges should have been convened, it would be our duty now to dismiss the appeal for want of jurisdiction. *An application to the Supreme Court for a writ of mandamus would then be available if the district judge declined to take steps to effectuate the convening of a three judge tribunal.*" (Emphasis added.)

But when Judge Cashin characterized as "dictum" the majority decision of the Court of Appeals that the orders of Judges Bicks and Dimock were without jurisdiction, Idlewild applied to that Court for rectification or clarification of its mandate (as was done in *National Comics Publications* v. *Fawcett Publications*, 2 Cir., 198 F. 2d 927 and *Epstein* v. *Goldstein*, 2 Cir., 110 F. 2d 747, 748) so as to make *explicit* what the majority decided:—that the orders of Judge Bicks and Judge Dimock were nullities since without jurisdiction, were in consequence vacated, and the case was remanded to the District Court for further proceedings not inconsistent with the decision of the Court of Appeals (146a).

Such was the procedure adopted under identical circumstances by the Third Circuit in *Two Guys From Harrison-Allentown, Inc.* v. *McGinley*, 3 Cir., 266 F. 2d 427 where the Court held that a three-judge district court was required and concluded (p. 433):

> "Consequently we will vacate the judgment of the court below and will remand the cause for appropriate action."

Again, in *Board of Supervisors* v. *Tureaud*, 5 Cir., 207 F. 2d 807, vacated and remanded on other grounds, 347 U. S. 971, the Court concluded (p. 810):

> "We are in no doubt that the suit from which this appeal comes was one for three judges, that the district judge was without jurisdiction to hear and determine the application for injunction, and that *the order should be vacated and the cause remanded to the district judge with directions to take further proceedings not inconsistent herewith.*" (Emphasis added.)

Such a procedure, in our view, is squarely authorized by 28 U. S. C. §2106, which confers upon the federal appellate courts jurisdiction to review and to:

> "• • • remand the cause and direct the entry of such appropriate judgment, decree or order, or require such further proceedings to be had as may be just under the circumstances."

We respectfully submit that by refusing to clarify its judgment, the Court of Appeals "has so far departed from the accepted and usual course of judicial proceedings, or so far sanctioned such a departure by a lower court, as to call for an exercise of this court's power of supervision". (This Court's Rule 19(1)(b).)

POINT III

Also a writ of mandamus is a further proper means of requiring Judge Bicks and Judge Dimock to convene a three-judge court for determining Idlewild's constitutional rights, or, failing that, to exercise for the protection of the plaintiff's statutory rights original jurisdiction under 28 U. S. C., Sections 1337 and 1331.

(1) These Sections expressly confer upon the District Courts "original jurisdiction of any civil action or proceeding arising under any Act of Congress regulating commerce," or (when the controversy exceeds $10,000 in value) "under the Constitution, laws or treaties of the United States". (See Complaint, 1a *et seq.*)

(2) *"Where the issue is essentially federal, the federal court proceeds at once."* (*All American Airways* v. *Village of Cedarhurst,* 2 Cir., 201 F. 2d 273, 277.) Idlewild's federal rights arise not only under the Constitution but also under a comprehensive and preemptive federal statutory and regulatory scheme and program in the national interest for the promotion of exports of domestic liquor in foreign commerce free of Federal or State tax.

This federal scheme was adopted by Congress in the exercise of its "exclusive and plenary" constitutional power to "regulate commerce with foreign Nations" (Art. I, §8, par. 3),—a power which "may not be limited, qualified or impeded to any extent by state action". *Board of Trustees* v. *U. S.*, 289 U. S. 48, 56-57; *National Distillers Products Corp.* v. *City and County of San Francisco,* Cal., 297 P. 2d 61, 65. The "exclusive and plenary" Federal power is "buttressed by" the Import-Export Clause (Art. I, §10, par. 2), *Board of Trustees* v. *U. S., supra,* 289 U. S. at pp. 56-57; *Parrott & Co.* v. *City and County of San Fran-*

cisco, Cal., 280 P. 2d 881, 885, and by "the supremacy of the national power in the general field of foreign affairs", *Hines* v. *Davidowitz*, 312 U. S. 52, 62.

This preemptive Federal program for commerce with foreign countries is, as stated at the outset hereof, embodied in Section 311 of the Tariff Act of 1930, 19 U. S. C. §1311 and the associated provisions of the Internal Revenue Code, 26 U. S. C. §§5521 and 5522; and it also involves a reciprocal *pro tanto* tax immunity as regards foreign countries. It is also implemented by detailed regulations and actual supervision and control by the United States Treasury Department, Bureau of Customs under the Tariff Act (19 C. F. R. Parts 18 and 19).

Accordingly, particularly in view of the current crisis in our balance of payments, we are dealing here with a national concern "so dominant that the federal system will be assumed to preclude enforcement of state laws on the same subject". *Rice* v. *Santa Fe Elevator Corp.*, 331 U. S. 218, 230; *Pennsylvania* v. *Nelson*, 350 U. S. 497, 504; *Hines* v. *Davidowitz*, *supra*, 312 U. S. 52, 62-69.

Moreover, "the scheme of federal regulation [is] so pervasive as to make reasonable the inference that Congress left no room for the States to supplement it". *Pennsylvania* v. *Nelson*, *supra*, 350 U. S. at p. 502; *Rice* v. *Santa Fe Elevator Corp.*, *supra*, 331 U. S. 218, 230.

Accordingly, we submit, since the exported liquor here involved is in a Federal enclave and under Federal sovereignty, the Federal courts may not abandon their *statutory* jurisdiction and obligation in exaggerated deference to "comity". *Johnson* v. *Yellow Cab Co.*, 321 U. S. 383, 386, 391-2; *Collins* v. *Yosemite Park Co.*, 304 U. S. 518, 536-538; *Maynard & Child, Inc.* v. *Shearer*, Ky., 290 S. W. 2d 790, 794.

Both the specific terms of the Constitution and the federated structure of our Government forbid New York and its agencies to trespass upon legislation and regulation by Congress acting in its own domain.

If the Alcoholic Beverage Control Law is inapplicable, Idlewild will be entitled to an injunction against its attempted enforcement here. If, on the other hand, the New York Law is applicable in its terms, then "it would conflict with federal law and the ban of the supremacy clause would come into play." *Penagaricano* v. *Allen Corporation*, 1 Cir., 267 F. 2d 550, 558. For this reason, the Court upheld the exercise of jurisdiction in the *Penagaricano* case, *supra*, stating (267 F. 2d at pp. 557-558):

> "* * * a preliminary glance at the apparent clash between federal and local authority reveals that * * * the exercise of federal authority here involved is wholly within the confine of a valid federal enactment * * *. And, whatever the local courts may hold to be the meaning of the local Act, the plaintiffs will be entitled to relief from its application. That is to say, *the plaintiffs will be entitled to the relief they request whichever way the local Act is construed.*" (Emphasis added.)

Thus, even if the terms of the Alcoholic Beverage Control Law should be construed to be applicable here, contrary to the uniform decisions of the New York Courts (p. 26, *infra*), "there can be no doubt" of the "direct clash" of the New York Statute "with the federal regulations" and hence "no occasion for postponement here for possible state action." *All American Airways* v. *Village of Cedarhurst*, 2 Cir., 201 F. 2d 273, 277; *Chicago* v. *Atchison Topeka & Santa Fe R. Co.*, 357 U. S. 77, 84, 89; *California Commission* v. *United States*, 355 U. S. 534, 538, 539.

(3) The assertion of the State Liquor Authority that under New York Law the plaintiff's business was "illegal" (25a) created an issue and was sufficient in itself to deter the plaintiff's domestic suppliers (51a, 131a). Hence Judge Bicks was mistaken in regarding the issue as

in a merely "tentative and hypothetical posture" (53a, 188 F. Supp. at p. 436).

In *Florida Lime Growers* v. *Jacobsen*, 362 U. S. 73, this Court reversed a three-judge District Court which had dismissed a declaratory-judgment complaint on the ground that there was no "existing dispute as to present legal rights" but only "a mere prospect of interference posed by the bare existence of the law in question" (362 U. S. at p. 85). This Court, in language applicable *a fortiori* here, said (362 U. S. at pp. 85-86):

> "It is therefore evident that there is an existing dispute between the parties as to present legal rights amounting to a justiciable controversy which appellants are entitled to have determined on the merits."

(4) Furthermore, Judge Bicks was not justified in abdicating his statutory jurisdiction, for such abdication is justified only in extraordinary circumstances, wholly absent here. As this Court held in *Allegheny County* v. *Mashuda Co.*, 360 U. S. 185, 188-189:

> "The doctrine of abstention, under which a District Court may decline to exercise or postpone the exercise of its jurisdiction, is an extraordinary and narrow exception to the duty of a District Court to adjudicate a controversy properly before it. Abdication of the obligation to decide cases can be justified under this doctrine only in the exceptional circumstances where the order to the parties to repair to the state court would clearly serve an important countervailing interest."

POINT IV

Furthermore, there was also no occasion to abstain in deference to the New York courts because those courts have settled the State Law in Idlewild's favor, and also because the state remedies are inadequate.

(1) In *Hillsborough* v. *Cromwell*, 326 U. S. 620, 629, this Court held that there was no occasion for "remitting the claimant to the state courts for determination of the local law question" where, as here, the State courts have given "an authoritative interpretation of the local law."

The New York courts have recognized the "exclusive and plenary" power of Congress to regulate foreign commerce; "the careful control exercised by government officials over goods that have been taken into Class 6 Warehouses"; and the fact that such goods are "constantly under government supervision" pursuant to Section 311 of the Tariff Act of 1930,—the very Federal statute invoked by Idlewild here under like circumstances (*Matter of Gulf Oil* v. *McGoldrick*, 256 App. Div. 207, 209, 210 (1st Dept., 1939), aff'd 281 N. Y. 647, aff'd *McGoldrick* v. *Gulf Oil Corp.*, 309 U. S. 414).

Accordingly, the New York courts have held that the New York Alcoholic Beverage Control Law,—the very statute which the State Liquor Authority here invokes, was not applicable, or was "inoperative" if applied, to sales of liquor under United States Customs bond, regulation and supervision, for export in foreign commerce,—the very transactions here involved. (*During* v. *Valente*, 267 App. Div. 383, 386 (1st Dept., 1944). The New York courts have therefore held that "international transactions in alcoholic beverages • • • would be beyond the regulatory powers of the State Liquor Authority." (*Rosenblum* v. *Frankel*, 279 App. Div. 66, 68 (1st Dept., 1951)).

(2) Furthermore, "abstention" is improper where, as here, the state remedies are, as here, inadequate.

In the first place, as this Court held in *California Commission* v. *United States*, 355 U. S. 534, abstention is improper where, as here, "The Commission has plainly indicated an intent to enforce the Act" (355 U. S. at p. 538), and the "issue is a constitutional one that the Commission can hardly be expected to entertain" (355 U. S. at p. 539). This Court concluded (p. 539):

> "But where the only question is whether it is constitutional to fasten the administrative procedure onto the litigant, the administrative agency may be defied and judicial relief sought as the only effective way of protecting the asserted constitutional right."

In the second place, Alcoholic Beverage Control Law §121, on which the State Liquor Authority relied before Judge Bicks (64a-65a), provides the sole method for judicial review of determinations of the State Liquor Authority, but limits any stay by the New York courts in such a proceeding "for a period not exceeding thirty days". *Matter of Yacht Club Catering* v. *Bruckman*, 276 N. Y. 44 holds that this period is mandatory, regardless of "irreparable damage to the individual" (276 N. Y. at p. 48). In accord: *Barcus* v. *O'Connell*, 281 App. Div. 1064 (3rd Dept., 1953).

For this reason, the State "remedy" afforded by Section 121 is utterly "inadequate", *Burack* v. *State Liquor Authority of the State of New York*, 160 F. Supp. 161 (E. D. N. Y., 1958), where the Court held (p. 165):

> "A further reason for my conclusion is the provision in §121, *supra*, that no stay shall be granted pending the determination of the matter for a period of more than thirty days. That period may not be extended. *Barcus* v. *O'Connell*, 281 App. Div. 1064, 121 N. Y. S. 2d 366. Because of that 30-day provision the time still available for the filing and final determi-

> nation of state court proceedings is inadequate. Even if the plaintiff should be successful in such a proceeding he would win but a Pyrrhic victory."

In *Pacific Tel. Co.* v. *Kuykendall*, 265 U. S. 196, this Court noted that the State law permitted a stay against a decision of a State administrative tribunal for only a limited period (there, one year). This Court reversed the decision of the district court refusing jurisdiction, and held (pp. 204-205):

> "Under such circumstances *comity yields to constitutional right*, and the fact that the procedure on appeal in the legislative fixing of rates has not been concluded will not prevent a federal court of equity from suspending the daily confiscation, if it finds the case to justify it." (Emphasis added.)

Even under the statutes forbidding the district courts to exercise jurisdiction over a challenge to State taxes or rate orders, this Court has uniformly held that the district court should exercise jurisdiction unless it affirmatively appears that "a plain, speedy and efficient remedy may be had in the courts of such State." 28 U. S. C. §§1341, 1342. *Corporation Comm.* v. *Cary*, 296 U. S. 452, 458; *Mountain States Co.* v. *Comm.*, 299 U. S. 167, 170; *Driscoll* v. *Edison Co.*, 307 U. S. 104, 110; *Hillsborough* v. *Cromwell*, *supra*, 326 U. S. 620, 628.

POINT V

A writ of mandamus to review the decision of Judge Dimock, as well as the decision of Judge Bicks, is likewise proper here.

(1) Judge Dimock acknowledged (91a):

> "Plaintiff certainly raises a serious legal issue when it states that what New York is regarding as unlawful has been ruled by the United States to be lawful foreign commerce."

Judge Dimock further recognized that after Judge Bicks' decision and Idlewild's ensuing appeal, the State Liquor Authority was attempting to drive Idlewild out of business forthwith: first under color of State law, then by its *subpoena duces tecum*, and then by overt threats to the interstate truckers who were Idlewild's last lifeline of supply. Accordingly, he granted a stay pending the appeal from Judge Bicks (91a, 93a-95a).

In our view, the error in Judge Dimock's decision was in his narrow application of the doctrine of the "law of the case" by mechanically following Judge Bicks, despite the State Liquor Authority's subsequent repudiation of its aforesaid representations to Judge Bicks and despite the fact that under these changed circumstances "there is no imperative duty to follow the earlier ruling." *Dictograph Products Co.* v. *Sonotone Corp.*, 2 Cir., 230 F. 2d 131, 135, dism. per stipulation 352 U. S. 883.

(2) We also respectfully submit that, for the following reasons, Judge Dimock further erred in denying Idlewild's application to quash the *subpoena duces tecum* issued by the State Liquor Authority.

(a) The *subpoena* was an overt effort by the State Liquor Authority to constitute itself as the tribunal to pass upon its own assault on Idlewild's Federal rights and upon constitutional issues which the State Liquor Authority "can hardly be expected to entertain." *California Commission* v. *United States, supra,* 355 U. S. at p. 539.

(b) Since the State Liquor Authority has no power to regulate or license Idlewild's export business, *Collins* v. *Yosemite Park Co.*, 304 U. S. 518, 539, its subpoena power is correspondingly confined to matters within its jurisdiction to regulate or license. *Gen. Tobacco & Grocery Co.* v. *Fleming,* 6 Cir., 125 F. 2d 596; *Federal Trade Comm.* v. *Smith,* 34 F. 2d 323 (S. D. N. Y., 1929); *Securities & Exchange Comm.* v. *Tung Corp.*, 32 F. Supp. 371, 373 (N. D. Ill., 1940).

(c) The subpoena was invalid under New York law since Civil Practice Act §406(1) expressly precludes administrative subpoenas relating to "a matter arising, or an act to be done, in an action in a court of record"; and this "matter" was then actively *sub judice.*

(d) Judge Dimock's denial of his power to quash the subpoena was directly contrary to his own decision in *Bell* v. *Waterfront Comm. of N. Y. Harbor,* 183 F. Supp. 175, 177, aff'd 2 Cir., 279 F. 2d 853, 858-9. See also *Albee Godfrey Whale Creek Co.* v. *Perkins,* 6 F. Supp. 409, 410 (S. D. N. Y., 1933).

POINT VI

Judge Cashin's decision constitutes such a departure from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's power of supervision by writ of mandamus.

As already noted, Idlewild promptly sought to comply with the majority opinion in the Court of Appeals by renewing its application to the District Court for the convening of a three-judge district court and for injunctive relief.

This was precisely in accordance with the procedure suggested by this Supreme Court in *Stratton* v. *St. Louis S. W. Ry. Co.*, *supra* 282 U. S. 10, 18, and by Judge (now Mr. Justice) Stewart in *Chicago, Duluth & Georgian Bay Transit Co.* v. *Nims*, *supra*, 252 F. 2d at p. 319.

Judge Cashin was clearly in error in characterizing as "*dictum*" the very essence and *ratio decidendi* of the majority of the Court of Appeals, thus clearly stated in their opinion (108a, 110a):

> "Having decided that Judge Bicks had no jurisdiction to proceed as he did, we must conclude from *Stratton* that we have no jurisdiction to entertain an appeal from his decision.
>
> "* * * we must hold that inasmuch as Judge Dimock exercised power properly exercisable only by a three-judge district court we have no jurisdiction to hear an appeal from his order."

Nevertheless Judge Cashin brushed these rulings aside as "dictum," and held himself bound to follow as "the law of this case" and "as still in full force and effect" the very orders which the Court of Appeals had just held to have been made without jurisdiction and hence without existence in law.

Having been rendered *without jurisdiction*, the orders of Judge Bicks and Judge Dimock were as a matter of law "nullities" and "void", *Valley* v. *Northern Fire Ins. Co.*, 254 U. S. 348, 353-4; *McQuillen* v. *Dillon*, 2 Cir., 98 F. 2d 726, cert. den. 305 U. S. 655; *Pollitz* v. *Wabash R. Co.*, 180 Fed. 950, 951 (C. C. S. D. N. Y.).

But even if these orders by Judges Bicks and Dimock, rendered without jurisdiction, could by any stretch of imagination possibly constitute "the law of this case," Judge Cashin was under "no imperative duty to follow" them. *Dictograph Products Co.* v. *Sonotone Corp.*, *supra*, 230 F. 2d at p. 135.

Judge Cashin suggested (a) an application for reargument to Judge Bicks,—a remedy which was wholly illusory as practical matter (141a), and also (b) an application for a writ of mandamus (135a).

Conclusion

Idlewild respectfully prays this Court to issue a writ of certiorari to the United States Court of Appeals for the Second Circuit, and or for leave to file its petition for writs of mandamus directed to Judge Bicks, Judge Dimock and Judge Cashin; and for such other reliefs as may be just and proper.

Respectfully submitted,

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